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NO. 75-1346

IN THE

Supreme Court of the United States

DOUGLAS C. BOYD, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOUGLAS C. BOYD, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DOUGLAS C. BOYD, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 23, 1975.

OPINION

The opinion of the United States Court of Appeals for the Fifth Circuit on original submission of the cause, and its order denying Petition for Rehearing appears in the appendix hereof.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered and delivered on December

23, 1975. Petition for Rehearing was denied on January 19, 1976. Judgment and Mandate of the United States Court of Appeals for the Fifth Circuit was issued on January 19, 1976. This Petition is being submitted to the Court within sixty (60) days of that date together with an Application for Extension of Time within which to file for a Writ of Certiorari pursuant to Rule 22(2), Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1) Whether search forming the basis of Appellant's conviction made at a temporary checkpoint ninety (90) miles north of Mexican border was a border search or its functional equivalent, or made without probable cause.

2) Whether Appellant should receive the benefit of United States Supreme Court's decisions in *United States v. Ponce,* ____U.S.____, 95 S.Ct. 2574 (1975) and *United States v. Ortiz,* ____U.S.____, 95 S.Ct. 2585 (1975), forbidding border patrol to conduct warrantless routine searches of vehicles at a temporary checkpoint absent probable cause or consent.

3) Whether Appellant was denied a speedy trial.

4) Whether the trial court abused its discretion in failing to comply with Rule 41 of the Federal Rules of Criminal Procedure by denying Appellant a pretrial hearing on his Motion to Suppress.

STATEMENT OF THE CASE

The Appellant, DOUGLAS C. BOYD, was charged with the offense of possession of marijuana with intent to distribute in violation of Title 21, U.S.C., § 841(a)(1).

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To said count, Appellant pled not guilty, and filed and urged his Motion to Suppress Evidence by the reason of an unlawful search and seizure. The Motion to Suppress was denied by the trial court. Appellant was tried by a jury and found guilty. Appellant filed his Supplemental Motion to Dismiss with leave of the Court alleging that he had been denied a speedy trial. Appellant's trial was on June 11, 12, 1974 some seventeen months after his arrest, and fifteen months after the Indictment was returned. The Court overruled the Supplemental Motion to Dismiss.

Appellant appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the actions of the United States District Court for the Southern District of Texas, Corpus Christi Division.

Facts indicate that Appellant, a Negro, was the driver of a 1973 Volvo automobile that was stopped at the Sarita, Texas Border Patrol temporary checkpoint. Said checkpoint was located about ninety (90) miles north of the Mexican Border. The date of Appellant's arrest was February 3, 1973.

At the time Appellant was stopped, he was accompanied by a young woman. Appellant and his companion were asked their citizenship, to which they replied they were United States citizens. They were thereafter directed to a secondary inspection area for inspection of the car's trunk, since, according to the agent, Appellant appeared "a little bit tense like he was trying to hide or conceal something," and more particularly, aliens.

Upon opening the trunk, no aliens were found; however, the agent smelled what appeared to be the odor of marijuana. Three suitcases in the trunk were ordered opened,

and a quantity of marijuana was discovered, samples of which were introduced as evidence at Appellant's trial over timely objection.

The search was supported by neither probable cause nor a search warrant, but the trial court denied Appellant's Motion to Suppress on the basis that there was a reasonable suspicion that there might be illegal aliens in the trunk of the car. None of the marijuana was in plain view, however, and was only discovered after the trunk of the car and thereafter the suitcases were opened.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this case because there should be no court holding whereby a person can be guilty of an offense on one date, but not guilty as of another date. The dates in question are June 21, 1973, [*Almeida-Sanchez v. United States,* 413 U.S. 266 (1973)] and June 30, 1975 [*United States v. Ortiz,* ____ U.S. ____, 95 S.Ct. 2585 (1975)].

There are no equities that allow retroactivity of *Almeida-Sanchez, supra,* to *Ortiz, supra,* but disallow it in the instant case. Constitutional ruling should be retroactive in all cases, if made in one case. The Fourth Amendment should not be the exception to the general rule that Constitutional rulings are given retroactivity. There always has been, and will be the necessity of probable cause, if the exclusionary rule is to have vitality.

There is no reason for discriminating against Appellant, since this case is of the same vintage as *United States v. Ortiz, supra.* It is largely chance, and the inordinate delay, occasioned by the trial court's heavy docket, between the date of the offense and the date of trial, that pre-

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cluded Appellant's case from being before this Court before *Ortiz, supra.* It is grossly unfair to deny retroactive application to all cases of the same vintage, thereby making justice a goddess of chance, and not equity, *dissents, Stovall v. Denno,* 388 U.S. 293 (1967); *Whisman v. Georgia,* 384 U.S. 895 (1966); *Johnson v. New Jersey,* 384 U.S. 719 (1966); *Linkletter v. Walker,* 381 U.S. 618 (1965).

Further, border agents should only search vehicles at temporary checkpoints if they are aware of specific articulable facts, together with rational inferences, that reasonably warrant suspicion that the vehicles may contain aliens who may illegally have entered the country.

The "reasonable belief" test of *United States v. Ponce, supra,* is in conflict with the "reasonable suspicion" test as applied by the Fifth Circuit. In the instant case, the "reasonable suspicion" was that Appellant "kinda looked tense" and that he had a "worried look in his eyes".

Furthermore, a Writ of Certiorari should issue in this case because Appellant was not accorded a speedy trial. The delay of seventeen (17) months, based on the trial court's findings, was occasioned by a crowded docket. Appellant did not create the delay, nor acquiesce in its injurious effects, *Barker v. Wingo,* 407 U.S. 514 (1972).

Appellant's case should have been tried while *Almeida-Sanchez, supra,* was viable law as to other cases of the same vintage. This court's subsequent decisions in *United States v. Peltier,* ____U.S____, 95 S.Ct. 2585 (1975), and *Bowen v. United States,* ____ U.S. ____, 95 S.Ct. 2569 (1975), demonstrate the harm that Appellant received by the failure of the trial court to accord a speedy trial.

Further, a Writ of Certiorari should issue in this case because Appellant was denied an opportunity to support his Motion to Suppress, since the trial court carried the Motion to Suppress along with the trial. The jury was allowed to hear all of the evidence on the Motion to Suppress at the same time it was considering guilt or innocence.

The trial court took the position that Appellant could not contest the admissibility of evidence except during the course of the trial. Thus, the Appellant could only effectively contest the Motion to Suppress if he would subject himself to cross examination in the presence of the jury. This is contrary to Rule 41, F. R. Crim. P. and *Simmons v. United States*, 390 U.S. 377 (1968).

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of March, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable James R. Gough, Assistant United States Attorney, United States Courthouse, 515 Rusk, Houston, Texas 77002, and Honorable Robert H. Borks, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

CALVIN A. HARTMANN

GORDON R. COOPER, II

Counsels For Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3510

Summary Calendar *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS C. BOYD, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(December 23, 1975)

Before WISDOM, BELL and CLARK, Circuit Judges.

PER CURIAM:

The search involved here took place prior to the decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), 93 S.Ct. 2535, 37 L.Ed.2d 596. Under the law applicable at the time of the search, the border patrol officer had a valid basis in reasonable suspicion to request the defendant driver to open the trunk of his vehicle stopped at the Sarita, Texas checkpoint. The odor of marijuana thereupon detected gave the officer probable cause to open and inspect the suitcases located in the trunk.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409 Part I.

The additional searches of the interior of the car and of the persons of its occupants did not occur until after arrest and were incident thereto. The court's action in deferring its determinations of the legality of the searches to the time of trial was not error.

The admission of exhibits consisting of marijuana sweepings from the floor of the vehicle, the ashtray, and the purse of the passenger accompanying defendant at the time the vehicle was stopped was within the court's discretion and did not require instruction limiting their evidentiary significance. The court did not abuse its discretion in limiting speculative cross-examination. The jury instructions given by the trial court adequately charged the elements of the offense and were otherwise free from plain error.

The detailed supplemental order of the trial court establishes that exceptional circumstances caused the periods of delay which were in excess of those provided in the Court's Plan for Achieving Prompt Disposition of Criminal Cases. *See* United States v. Rodriguez, 497 F.2d 172 (5th Cir. 1974). The showing of prejudice to the defendant necessary to elevate pretrial delay to a constitutional violation is absent from this case. *See* Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3510

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOUGLAS C. BOYD, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(January 19, 1976)

Before WISDOM, BELL and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1346

DOUGLAS C. BOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1975, and a petition for rehearing was denied on January 19, 1976. The petition for a writ of certiorari was not filed until March 18, 1976, and therefore is 28 days out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether marihuana seized from petitioner's automobile during a pre-*Almeida-Sanchez* search at a

Border Patrol immigration traffic checkpoint was properly admitted in evidence at trial.

2. Whether petitioner was denied a speedy trial.

3. Whether the district court abused its discretion by deferring until trial the determination of petitioner's pre-trial motion to suppress the fruits of the checkpoint search.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment, to be followed by a special parole term of two years. The court of appeals affirmed (Pet. App. A).

On February 3, 1973, the automobile in which petitioner and a female companion were riding was stopped by Border Patrol agents at the immigration traffic checkpoint maintained by the Border Patrol near Sarita, Texas, about 85 miles from the Mexican border. Petitioner, appearing tense and nervous, was asked to open the trunk of the car. When he did so, a Border Patrol agent smelled marihuana. The agent opened three suitcases found in the trunk and discovered 143 pounds of marihuana, a sample of which was subsequently introduced in evidence at petitioner's trial (Tr. 18, 56-62, 92). Petitioner's pretrial motion to suppress the marihuana was consolidated with the trial and denied when the case was submitted to the jury (Tr. 182).

ARGUMENT

1. Petitioner contends that the marihuana should have been suppressed under this Court's decisions in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, and

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United States v. *Ortiz*, 422 U.S. 891. But this Court has already held that the principles of *Almeida-Sanchez* are not to be applied retroactively to invalidate checkpoint searches conducted prior to June 21, 1973. *Bowen* v. *United States*, 422 U.S. 916. Since the search here was conducted on February 3, 1973, *Bowen* is dispositive of petitioner's contention.

2. Petitioner's claim that he was denied a speedy trial is likewise without merit. In *Barker* v. *Wingo*, 407 U.S. 514, this Court identified several factors to be assessed in determining whether a defendant has been denied his right to a speedy trial. These include the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant (407 U.S. at 530). In this case, the record shows that the lapse of thirteen and one-half months between petitioner's indictment on April 17, 1973, and his trial on June 3, 1974, was caused by a combination of petitioner's own actions and a crowded court calendar.[1]

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[1]On August 18, 1975, the court of appeals remanded the case to the district court for supplemental findings of fact on the cause of the delay between petitioner's arraignment and trial. The district court's findings, entered on November 4, 1975, revealed that petitioner's original arraignment, scheduled for May 24, 1973, well within the 45-day time limit established in the district court's plan for prompt disposition of criminal cases, was postponed upon the representation of his counsel that petitioner was seeking new counsel. Petitioner's second arraignment, scheduled for June 15, 1973, was postponed upon petitioner's failure to appear. Petitioner was eventually arraigned on July 6, 1973. On April 9, 1974, two days prior to a scheduled pre-trial hearing on petitioner's motion to suppress, petitioner moved for a continuance due to his counsel's illness. The case was reset for trial on June 3, 1974, and the trial commenced on that date.

The district court also found that the nine months between petitioner's July 1973 arraignment and April 1974 motion for continuance were marked by a severely congested court docket that prevented petitioner's trial during that period. The court documented its conclusion with court records indicating voluminous trial and pretrial activity.

The record does not reflect, and petitioner does not allege, any attempt by the government to hamper his defense through unnecessary delay (see 407 U.S. at 531). Moreover, at no time prior to his trial did petitioner assert his right to a speedy trial. Finally, petitioner's sole allegation of prejudice caused by pre-trial delay appears to be that, if his trial had been held earlier, prior to this Court's decision in *Bowen*, he might have been the beneficiary of an erroneous retroactive application to his case of the principles of *Almeida-Sanchez*. But even if such an error would not subsequently have been corrected, the asserted "harm" cannot fairly be advanced as prejudice cognizable under the *Barker* standards.

3. Petitioner contends (Pet. 6) that the district court erred by deferring until trial the determination of his pre-trial motion to suppress the fruits of the checkpoint search, thereby permitting the jury to hear possibly irrelevant and inadmissible evidence and precluding him from testifying in support of his motion without subjecting himself to cross-examination in front of the jury. Rule 12(e), Fed. R. Crim. P., however, clearly permits the district court, for good cause, to defer until trial its decision on pre-trial motions. *United States* v. *Covington*, 395 U.S. 57, 60; *United States* v. *Spagnuolo*, 515 F.2d 818, 820 (C.A. 9). Here the indictment alleged possession of marihuana with intent to distribute it. The marihuana was discovered during a routine search at an immigration checkpoint. Testimony concerning the search was therefore admissible both on the suppression motion and as part of the government's case-in-chief. Had the search been found unlawful, the government's case would have failed. Thus, the court's decision to consolidate the suppression hearing with the trial furthered the interest of judicial economy and did not result in the introduction of irrelevant or prejudicial testimony.

Moreover, the court made clear at the outset of the trial its intention to excuse the jury whenever it would become appropriate to hear testimony concerning the suppression motion out of the jury's presence (Tr. 5-7). Petitioner did not seek to testify in support of his motion and specifically declined an invitation to present evidence outside the presence of the jury (Tr. 116). Petitioner's present assertion that he "could only effectively contest the Motion to Suppress if he would subject himself to cross-examination in the presence of the jury" (Pet. 6) is thus refuted by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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MAY 1976.

DOJ-1976-05